No. 83-614

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SECURITIES INDUSTRY ASSOCIATION,
Petitioner,

v.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM, *et al.*,
Respondents.

BRIEF OF RESPONDENT BANKAMERICA CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Of Counsel:

H. HELMUT LORING
P.O. Box 37000
San Francisco, CA 94137
(415) 622-2302

ARNOLD M. LERMAN
(*Counsel of Record*)
GARY D. WILSON
ALAN S. TENENBAUM
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Attorneys for BankAmerica Corporation

December 16, 1983

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

The Federal Reserve Board approved the application of a bank holding company to acquire a securities brokerage firm which acts as agent in arranging for the purchase and sale of securities by customers. The petition raises two issues:

1. Did the Court of Appeals correctly uphold the decision of the Board that the acquired firm's brokerage services are closely related to banking within the meaning of the Bank Holding Company Act because banks have traditionally performed these services and are particularly well equipped to do so?

2. Did the Court of Appeals correctly uphold the decision of the Board that Section 20 of the Glass-Steagall Act, which prohibits the affiliation of Federal Reserve member banks with investment bankers, does not prohibit affiliation with this brokerage firm?

RULE 28.1 STATEMENT

BankAmerica Corporation owns, directly or indirectly, more than 50 percent but less than 100 percent of the voting stock of the following:

Decimus Corporation
Decimus Computer Leasing Corporation
Banca d'America e d'Italia

BAI Leasing Venture
Finabai-Societe Financiere S.A.
BAI Bank (Cayman) Ltd.

BA Australia Limited

Bamerical Investments (Australia) Limited
Bamerical Nominees (Australia)
Proprietary Ltd.

BA (Australia) Holding Proprietary, Ltd.
BA Investors Mgt. Ltd.
BA Australia Leasing Ltd.
Bamerical Proprietary Ltd.
BA (Australia) Hong Kong Ltd.

Bank of America Cameroon
BankAmerica Representaco e Servicios Ltd.
Commercial Bank of Africa

TABLE OF CONTENTS

	Page
Questions Presented	i
Rule 28.1 Statement	ii
Table of Authorities	iv
Statement of the Case	1
I. The Court of Appeals' Construction of the Bank Holding Company Act Is a Routine Reading of the Act That Follows the Established Precedents of This Court and Other Courts of Appeal	4
II. The Court of Appeals' Construction of the Glass-Steagall Act Is a Routine Reading of the Act That Follows Established Precedent of This Court and Is In Accord With a Longstanding Interpretation of the Federal Reserve Board	8
III. The Court of Appeals' Decision Presents a Narrow Question Limited to One Activity of a Nonbank Subsidiary of a Bank Holding Company	11
Conclusion	12

TABLE OF AUTHORITIES

CASES: Page

Alabama Association of Insurance Agents v. Board of Governors, 533 F.2d 224 (5th Cir. 1976), *cert. denied*, 435 U.S. 904 (1978) 5, 6

Association of Bank Travel Bureaus, Inc. v. Board of Governors, 568 F.2d 549 (7th Cir. 1978) 5

Board of Governors v. Agnew, 329 U.S. 441 (1947) 4, 8

Board of Governors v. Investment Company Institute, 450 U.S. 46 (1981) ..... *passim*

Citicorp, 68 Fed. Res. Bull. 505 (1982) 5

JCT Trust Co., 67 Fed. Res. Bull. 635 (1981) 7

NCNB Corp. v. Board of Governors, 599 F.2d 609 (4th Cir. 1979) 5

National Courier Association v. Board of Governors, 516 F.2d 1229 (D.C. Cir. 1975) 5, 6

Securities Industry Association v. Comptroller of the Currency, [Current] Fed. Banking L. Rep. (CCH) ¶ 99,771 (D.D.C. November 2, 1983) 9, 10

STATUTORY PROVISIONS:

12 U.S.C. § 24 (Seventh) 9

12 U.S.C. § 36 10

12 U.S.C. § 78 8

12 U.S.C. § 81 10

12 U.S.C. § 221a(b) 8

12 U.S.C. § 377 8

12 U.S.C. § 1841 1

12 U.S.C. § 1843(c)(8) 2, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-614

SECURITIES INDUSTRY ASSOCIATION,
Petitioner,

v.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM, *et al.*,
Respondents.

BRIEF OF RESPONDENT BANKAMERICA CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent BankAmerica Corporation (Intervenor below) submits this brief in opposition to the petition for writ of certiorari filed by petitioner Securities Industry Association.

STATEMENT OF THE CASE

BankAmerica Corporation ("BankAmerica") is a bank holding company within the meaning of the Bank Holding Company Act. 12 U.S.C. § 1841. The Charles Schwab Corporation ("Schwab") provides retail brokerage and related services. (3a.)[1] In March 1982, BankAmerica

[1] The opinions below are reprinted in the appendix to the petition for writ of certiorari and are cited herein as "—a."

applied to the Board of Governors of the Federal Reserve Board ("Board") for permission to acquire Schwab. Section 4(c)(8) of the Bank Holding Company Act, 12 U.S.C. § 1843(c)(8), authorizes the Board to approve such acquisitions if the acquired firm's business is "closely related" to banking and the acquisition is likely to produce public benefits that outweigh any adverse consequences.

The Securities Industry Association ("SIA")—a trade association of securities brokers, dealers, and underwriters—opposed the application and requested a hearing. The Antitrust Division of the Department of Justice, the Comptroller of the Currency, and the Securities and Exchange Commission all filed comments in support of the application. (3a-4a.)

The Board ordered a formal administrative hearing, which was held before an Administrative Law Judge in September 1982. A record was developed through the submission of written testimony and documentary exhibits, followed by the cross-examination of witnesses. The United States Department of Justice participated in the hearing and again urged that the application be granted. After the hearing, the Administrative Law Judge recommended unconditional approval of the application. (22a.)

On January 7, 1983, the Board approved the application and issued a full decision and order. In its order, the Board made the following findings:

1. Schwab's retail brokerage business consists principally of acting as agent to arrange for the buying and selling of securities on customers' orders. Schwab does not engage in underwriting or dealing, does not purchase securities for its own account, and does not promote the securities of any particular issuer. (23a.)

2. Banks, through the trading desks of their trust departments, "routinely buy and sell securities as agent" for their trust accounts. Banks also

provide brokerage services to their banking customers as an accommodation. Banks frequently execute both customer and trust department orders for unlisted securities by making direct arrangements for purchase and sale. For listed securities, banks have generally used intervening brokers to execute transactions, but often in circumstances where the bank has made all basic decisions with respect to execution and left to the broker only the ministerial act of execution of the transaction. (25a-27a.)

3. In buying and selling securities for the account of customers and for trust accounts, banks have performed the same functions, utilized the same execution techniques, employed personnel with the same expertise, used the same facilities as brokers, and engaged in activities that were operationally and functionally so similar to the types of service engaged in by Schwab that banking organizations were particularly well equipped to provide them. (25a-27a.)

Based upon these findings, the Board concluded that Schwab's brokerage services were closely related to banking under the Bank Holding Company Act and were not within any proscription of the Glass-Steagall Act. The Board also found that approval of the application should result in "significant public benefits in the form of intensified competition, increased efficiency, and greater consumer convenience in the provision of retail securities brokerage services to the public" and that the benefits of the transaction warranted approval in the public interest. (32a.)

On January 11, 1983, BankAmerica acquired Schwab. On February 3, 1983, petitioner SIA sought judicial review of the Board's order in the United States Court of Appeals for the Second Circuit. On July 15, 1983, the Court of Appeals unanimously affirmed the Board's order.

The Court of Appeals held that the Board had properly concluded that Schwab's brokerage activities were

"closely related" to banking. It noted that the statute conferred substantial discretion on the Board, that the Board's findings were "clearly" supported by substantial evidence, and that the Board, in reaching its conclusion, had followed the established standards employed by other courts of appeals and by this Court in *Board of Governors v. Investment Company Institute*, 450 U.S. 46 (1981). (15a-19a.)

The Court of Appeals likewise held that the Board had properly concluded that the Glass-Steagall Act does not proscribe brokerage activities by non-bank affiliates of bank holding companies. The Court reasoned that the plain language of Section 20—the only section of the Act directly applicable—applies to underwriting activities, which involve distribution of new issues of securities, but does not embrace agency activities which involve no risk as principal or promoter. (5a-9a.) The Court of Appeals noted that this interpretation of Section 20 adheres to the Board's longstanding construction of parallel language in Section 32 of the Glass-Steagall Act, follows this Court's implicit interpretation of the same provision in *Board of Governors v. Agnew*, 329 U.S. 441 (1947), and conforms to the policies underlying the Glass-Steagall Act. (6a-9a.)

I. The Court of Appeals' Construction of the Bank Holding Company Act Is a Routine Reading of the Act That Follows the Established Precedents of This Court and Other Courts of Appeal

Section 4(c)(8) of the Bank Holding Company Act authorizes the Board to allow bank holding companies to engage in activities that it finds are "closely related" to banking. The Board and various courts of appeals have articulated standards for making this determination, including that an activity is closely related to banking if:

> "Banks generally provide services that are operationally or functionally so similar to the proposed services as to equip them particularly well to provide the proposed service . . . ."

National Courier Association v. Board of Governors, 516 F.2d 1229, 1237 (D.C. Cir. 1975); *NCNB Corp. v. Board of Governors*, 599 F.2d 609, 613 (4th Cir. 1979); *Alabama Association of Insurance Agents v. Board of Governors*, 533 F.2d 224, 241 (5th Cir. 1976), *cert. denied*, 435 U.S. 904 (1978); *Association of Bank Travel Bureaus, Inc. v. Board of Governors*, 568 F.2d 549 (7th Cir. 1978); *Citicorp*, 68 Fed. Res. Bull. 505 (1982).[2]

This Court embraced a similar test in *Board of Governors v. Investment Company Institute*, *supra*, where the Court held that the Board properly found that investment advisory services were closely related to banking. This Court reasoned that investment advisory services are closely related to banking because they "are not significantly different from the traditional fiduciary functions of banks." 450 U.S. at 55.[3]

The well-established standard the Board and Court of Appeals applied in this case presents no issue worthy of review. That standard is consistent with the views of this Court and has been routinely applied by every court of appeals that has had occasion to consider the issue. Nor is there any conflict between the Court of Appeals' decision and the Fifth Circuit's decision in *Alabama Association of Insurance Agents v. Board of Governors*, *supra*.

---

[2] As the Board and courts of appeals have noted, there is no exclusive test for determining whether an activity is closely related to banking. (15a, 24a.) *National Courier Ass'n v. Board of Governors*, 516 F.2d at 1237; *Alabama Ass'n of Insurance Agents v. Board of Governors*, 533 F.2d at 241, 244 (any rational nexus to banking suffices to make an activity closely related to banking).

[3] To the extent that SIA argues that an activity must facilitate or support authorized bank activities, Petition at 18, that contention is wholly inconsistent with this Court's decision in *Board of Governors v. Investment Company Institute*. In that case the Court never even considered whether investment advisory services for closed end mutual funds facilitate banking practices, and, as the Court of Appeals noted, "it seems quite clear that they do not." (18a.)

Alabama Insurance applied the same standard adopted by the Court of Appeals here. 533 F.2d at 241.[4]

The application of the standard to the brokerage activities in this case likewise presents no real issue.[5]

---

[4] The Fifth Circuit concluded that certain types of bank insurance activities were not closely related to banking under this standard because the court had "been apprised of no general practice on the part of banks" to engage in such types of insurance activities. 533 F.2d at 241. Brokerage activities, in contrast, were found by the Board and Court of Appeals here to be generally performed by banks. (15a.)

Moreover, SIA misrepresents the Fifth Circuit's decision as requiring a "direct relationship" between an activity and banking for the activity to be considered closely related to banking, Petition at 18 (quoting 533 F.2d at 240). The discussion of a requirement of a "direct relationship" comes not from the Fifth Circuit's construction of the Bank Holding Company Act but from one of the Board regulations there at issue. That regulation authorized activities regarding insurance "directly related" to bank services, such as insurance on loan collateral. 533 F.2d at 240. The Fifth Circuit upheld the regulation because obviously activities that are directly related to banking are closely related to banking. The Court went on to find that the Board had properly found other insurance activities closely related to banking even though it believed they were only "indirect[ly]" related to banking. 533 F.2d at 241, 244.

Indeed, as noted above, *see* note 2 *supra*, there is no exclusive test for determining whether an activity is closely related to banking. The discussion in *Alabama Insurance* to which SIA refers (Petition at 18-19) dealt with other tests in addition to those set forth in *National Courier*, which would be used as an *additional* basis for finding an activity closely related to banking. That discussion is neither relevant to nor in conflict with the Court of Appeals' decision here.

[5] The Court of Appeals' application of the standard follows this Court's similar application of the standard in *Board of Governors v. Investment Company Institute*. Contrary to SIA's assertion, Petition at 13, the history of securities brokerage activity by banks is the same as that of the bank investment advisory services. Banks have engaged in both for decades. While banks have not conducted actual retail brokerage or investment advisory "businesses," *see* Petition at 13, they have traditionally offered their customers a

Banks have long performed a wide range of brokerage services. (15a, 24a.) The only thing that Schwab does that banks historically have not done is to execute its customers' trades on national exchanges. (15a-16a.) But as the Board found, banks frequently execute transactions for their customers when trading unlisted securities. Banks also often direct brokers on the desired method of execution for listed securities, leaving to the broker only technical execution, a largely ministerial act deemed to be insignificant under the closely related standard. (16a.)[6] The Court of Appeals quite properly noted that the Board's findings were supported by substantial evidence and that the Board's conclusion was well within its area of expertise and the discretion committed to it by statute.[7]

---

variety of brokerage and investment advisory services. (15a, 24a-26a.)

Also contrary to SIA's assertion, Petition at 8, this was not even the first Board decision authorizing a subsidiary of a bank holding company to engage in brokerage services. *See JCT Trust Co.*, 67 Fed. Res. Bull. 635 (1981).

[6] As the Administrative Law Judge found in his Recommended Decision in this case, the only reason banks have not historically executed trades on national exchanges is that there were anti-competitive rules in earlier years that excluded banks from exchange membership and fixed prices so that there was little economic incentive for banks to compete with brokers. *See* Recommended Decision at 105-06.

[7] As the Court of Appeals pointed out,

> "The Board . . . has expertise in commercial bank regulation that the courts do not have, and it must be allowed reasonable latitude in its application of the Act to the changing activities of banks. For these reasons the Board's determination that brokerage is closely related to banking 'is entitled to the greatest deference,' *Invest. Co. Inst., supra*, 450 U.S. at 56 (footnote omitted), and may be overturned only if unreasonable or inconsistent with Congressional intent." (17a.)

Contrary to the assertion of SIA, Petition at 5, the Court of Appeals did not, however, simply defer to the Board's judgment. The Court recognized and fulfilled its "ultimate responsibility" of de-

II. The Court of Appeals' Construction of the Glass-Steagall Act Is a Routine Reading of the Act That Follows Established Precedent of This Court and Is In Accord With a Longstanding Interpretation of the Federal Reserve Board

The Court of Appeals held that Section 20 of the Glass-Steagall Act encompasses underwriting-type activities but not brokerage. Section 20 provides in relevant part that

> "[N]o member bank shall be affiliated in any manner . . . with any corporation, association, business trust, or other similar organization *engaged principally in the issue, flotation, underwriting, public sale, or distribution* at wholesale or retail . . . of stocks, bonds, debentures, notes, or other securities . . . ."

12 U.S.C. § 377 (emphasis supplied).[8]

Since 1936, language identical to that in Section 20 has been construed by the Board to apply only to underwriting-type activities and not to brokerage. The identical language appears in Section 32 of the Act, which prohibits director, officer, or employee interlocks between member banks and entities primarily engaged in "the issue, flotation, underwriting, public sale, or distribution" of securities. 12 U.S.C. § 78. As the Court of Appeals noted, this Court implicitly upheld the Board's construction of Section 32 in *Board of Governors v. Agnew*, 329 U.S. 441 (1947), and at the same time equated the list of prohibited activities in Section 20 with the "underwriting field." *Id.* at 445 & n.3. Similarly, in *Board of Governors v. Investment Company Institute*,

---

termining that the Board's interpretation was reasonable and consistent with the language and policy of the Glass-Steagall Act and the Bank Holding Company Act. (4a-5a.)

[8] Bank of America NT & SA, a member bank, is BankAmerica's principal subsidiary; any other majority-owned subsidiary of BankAmerica is thus an affiliate of a member bank. 12 U.S.C. § 221a(b).

supra, this Court referred to the language of Section 20 as "prohibit[ing] national banks or state bank members of the Federal Reserve System from owning securities affiliates . . . that are 'engaged principally' in the *issuance or underwriting of securities.*" 450 U.S. at 59 n.24 (emphasis added).

The Court of Appeals noted that this interpretation is consistent with the language of Section 20 itself. The terms used in Section 20 refer to underwriting-type activities and not to brokerage.[9] The Court of Appeals pointed out that elsewhere in the Act when Congress intended to deal with brokerage it did so by using words that unmistakably described brokerage activities. Thus, Section 16 of the Act authorizes banks to "purchas[e] and sell[] . . . securities . . . without recourse, solely upon the order, and for the account of, customers." 12 U.S.C. § 24 (Seventh). (6a.)

SIA claims that Section 20 should nonetheless be read as if it included the brokerage language set forth in Section 16 and that Section 16 would prohibit the brokerage activities at issue here. In fact, Section 16 would not prohibit even banks from engaging in such brokerage activities; the United States District Court for the District of Columbia has recently so held in litigation

---

[9] SIA contends that the term "public sale" in Section 20 and Section 32 should be read to include brokerage as well as underwriting-type activities. Petition at 15. Not only is this argument inconsistent with longstanding interpretation of the Board implicitly approved by this Court, but it would violate the familiar principle of statutory construction that words grouped together in a list should be given a related meaning. As the Court of Appeals noted, the terms "issue," "flotation," "underwriting," and "distribution" in Sections 20 and 32 all involve the marketing of securities acquired from an issuer. (5a.) The term "public sale" has also been used as a term for underwriting-type activities, and giving it that meaning is far more natural than giving it one that encompasses brokerage, which involves secondary market trading as an agent for commission.

brought by SIA against the Comptroller of the Currency.[10] But, in any event, the Court of Appeals found it unnecessary to decide the extent of the brokerage activities permitted under Section 16. That section, the Court said, applies only to banks; Section 20 applies to bank affiliates and nothing in Section 20 prohibits affiliates from providing brokerage services. (11a-12a.)

In this respect, the Court of Appeals simply affirmed the well-settled rule that affiliates are governed by the Act's special provisions relating to them and not by limitations on the direct activities of banks. As this Court noted in *Board of Governors v. Investment Company Institute*, *supra*, the structure of the Glass-Steagall Act "reveals a Congressional intent to treat banks separately from their affiliates." 450 U.S. at 59 n.24. *See also id.* at 64:

> "In both the Glass-Steagall Act itself and in the Bank Holding Company Act, Congress indicated that a bank affiliate may engage in activities that would be impermissible for the bank itself."

---

[10] In *Securities Industry Ass'n v. Comptroller of the Currency*, [Current] Fed. Banking L. Rep. (CCH) ¶ 99,771 (D.D.C. Nov. 2, 1983), SIA challenged the Comptroller's approval of the applications of two banks to acquire or establish bank subsidiaries that would engage in securities brokerage activity. Two issues were presented to the court. The first was whether a bank itself could engage in brokerage activities. With respect to that issue the District Court ruled in favor of the Comptroller and found that Section 16 did not proscribe brokerage activities by banks or bank subsidiaries. The second issue presented was whether a bank could engage in brokerage activities at offices other than authorized branches under the McFadden Act, 12 U.S.C. §§ 36, 81. On this issue, the District Court granted plaintiff's motion for summary judgment and found that a bank could not engage in brokerage activities at unauthorized branches. Of course, the McFadden Act has no application to the activities of non-bank subsidiaries of bank holding companies.

III. The Court of Appeals' Decision Presents a Narrow Question Limited to One Activity of a Nonbank Subsidiary of a Bank Holding Company

SIA seeks to portray this case as a seminal event by which regulatory agencies will launch banking institutions into a variety of activities heretofore prohibited to them. SIA refers to various litigation arising out of recent regulatory approval of different types of services offered by national banks, state banks, or savings and loan associations. It is true that SIA and other trade associations have fomented a number of proceedings seeking to prevent banks and thrift institutions from competing with their members. For example, as SIA notes, they have challenged regulatory approvals for national banks to sell commercial paper, to administer IRA trusts, and to provide investment advisory services to the public; and they have sued to prevent state chartered banks that are not members of the Federal Reserve System and federally chartered savings and loan associations from engaging in brokerage.

The instant case involves the provision of brokerage services by a non-bank affiliate of a bank holding company. It applies the Bank Holding Company Act and the Glass-Steagall Act pursuant to established standards and precedents of the Federal Reserve Board, this Court, and other courts of appeals. None of the other actions to which SIA refers concerns any of the issues involved in this case. Each raises issues that will be tested as they mature under the particular statutory provisions and regulatory schemes that are involved. It may also be, as SIA suggests, that Congress will consider one or more of these other issues. But neither the fact that such issues have been raised nor the existence of other discrete cases calls for this Court's review of the routine and narrow questions presented here.

CONCLUSION

For all of the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:

H. HELMUT LORING
P.O. Box 37000
San Francisco, CA 94137
(415) 622-2302

ARNOLD M. LERMAN
(*Counsel of Record*)
GARY D. WILSON
ALAN S. TENENBAUM
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Attorneys for
BankAmerica Corporation

December 16, 1983